From Arms Race to Marketplace: The Complex Patent Ecosystem

For several decades, high-tech companies have acquired patents in order to deter others from suing them. According to the logic of the patent arms race, an arsenal of patents provides protection to patentees by discouraging would-be plaintiffs from filing suit. Recently, a secondary market for patents has emerged, providing new opportunities to buy and sell patents. Non-practicing entities (NPEs), who don't make products, have acquired patents on the patent market and used them to become some of the most active litigants in the patent system.

The co-existence of the “arms race” and “marketplace” paradigms has produced a new patent ecosystem in high-tech industries. This ecosystem is more complex than past environments, featuring a wide variety of business models for exploiting patents and high levels of asymmetry between actors in terms of resources, exposure, and patent litigation stakes. This article explores this new complex ecosystem in depth and argues that it upsets conventional wisdom about the patent system in several ways.

Under classical defensive patenting theory, for instance, patents have long been assumed to provide companies with the freedom to operate. This theory breaks down, however, in the face of new players in the current patent environment against whom the right to exclude has little to no meaning. As a result, defensive strategies must be reconceptualized to include new tactics – including prevention, disruption, and offensive action – for securing freedom to operate.

Second, an important strand of patent valuation theory assumes that the value of a patent can be determined prospectively, during the patenting process. But in today’s complex patent ecosystem, patents can repurposed and applied to a diverse set of ends over their lifetimes as they are bought and sold in the marketplace. Such patent pathways call into question theories of patent value and proposals to reform the patent system based on them.

Finally, the history of the new complex ecosystem suggests a new lever for changing the patent system – patentees themselves. Suggested tweaks to this lever would change the patent system not by changing the law, as most suggested reforms would, but directly by changing patentee behavior.